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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL
COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Section 273 of the)
Communications Act of 1934, as)
amended by the Telecommunications)
Act of 1996)

CC Docket 96-254

**COMMENTS OF THE
INFORMATION TECHNOLOGY INDUSTRY COUNCIL**

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Summary

Because of the accelerating convergence of information technology equipment and traditional telephony equipment, the Commission must adopt Section 273 rules that are flexible enough to preserve the innovation that characterizes today's equipment market, but specific enough to protect competition in equipment manufacturing markets as the BOCs receive authority to enter them.

To this end, the Commission should adopt rules that require all BOCs to disclose information regarding protocols and technical requirements "at the highest level of disaggregation feasible." Manufacturers should have the opportunity to seek additional information where a BOC's initial disclosure is insufficient, and to seek FCC intervention where necessary. BOC disclosure must include access to information regarding software integral to a BOC's network facilities and the date by which the BOC intends to implement any disclosed protocol or technical requirement (or change thereto).

Section 273(c)'s disclosure requirements should apply to information provided by a BOC to *any* manufacturer with whom it collaborates or enters into a royalty agreement or through which it engages in manufacturing research. This disclosure, however, must not include proprietary information provided to a BOC from a partner who is not subject to the 1996 Act's requirements.

The timing requirements for disclosure must be flexible to reflect the wide differences in design and production cycles for equipment covered by Section 273. The Commission should grant BOCs limited flexibility to determine, on a

case by case basis, the disclosure timing that satisfies the statute which may include, for example, the “make/buy” point or the commencement of field trials or beta testing.

To prevent anti-competitive abuse of this flexibility, the Commission must prescribe certain procedural parameters to ensure compliance. These measures may include a minimum time frame prior to introduction of a new service or network change and an opportunity for competing manufacturers to seek additional information and/or enforcement of the Section 273 disclosure rules. At all times, the disclosing BOC should bear the burden of proving that its disclosure complied with the statutory standard.

In addition to requiring hard copy filings of disclosed information with the Commission, ITI supports the Commission’s proposal to use an Internet web site to maintain Section 273 information controlled by the Commission with hypertext links to BOC Internet sites.

The Commission should require that all BOCs, and not only those who engage in manufacturing, should be required to comply with the disclosure and procurement provisions in Sections 273(c) and 273(e).

Finally, ITI urges the Commission to strictly construe the Section 273 requirements for standard-setting entities. Only an impartial standard-setting process will help to preserve the dynamic, competitive equipment marketplace, which is, at bottom, the overriding aim of Section 273.

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INTRODUCTION

The Information Technology Industry Council ("ITI") submits the following Comments in response to the Notice of Proposed Rulemaking ("NPRM")¹ released in the proceeding captioned above.

ITI is the leading trade association for manufacturers and vendors of computers, computing devices, office equipment and information services. Over the years, ITI has underscored its commitment to superior quality, economic efficiencies, and technical innovation in information services and equipment markets by participating actively in the promulgation of rules that will achieve these objectives. ITI believes that competition, and not regulation, is the

¹ Implementation of Section 273 of the Communications Act, as amended by the Telecommunications Act of 1996, CC Docket No. 96-254, Notice of Proposed Rulemaking, FCC 96-472 (Released December 11, 1996) ("NPRM")

appropriate vehicle for developing rules consistent with the pro-competitive policies of the Telecommunications Act of 1996 ("Act").² However, successful competition requires a level playing field, and it is toward this end that ITI supports the Commission's efforts to implement Section 273 of the 1996 Act.

Section 273 requires the Commission to establish rules that will both facilitate the Bell Operating Companies' ("BOCs") entry into the manufacturing markets for telecommunications and customer premises equipment, and ensure that the BOCs compete fairly in those markets. ITI supports rules that will safeguard competitive equipment markets by requiring timely disclosure of technical information sufficient for manufacturers to connect their equipment to the BOCs' telephone networks.

Today's consumer equipment market is undergoing profound technological change. The historically distinct markets for telecommunications equipment ("TE") and customer premises equipment ("CPE"), on the one hand, and information technology ("IT") equipment such as traditional computing devices, on the other hand, are converging rapidly. IT appliances increasingly incorporate the features and functions traditionally associated exclusively with telephony TE or CPE, and vice versa. Thus, at this stage in the evolution of IT appliances and traditional telephony equipment, it is not possible to predict with confidence the myriad issues which may arise in connection with BOC manufacturing of equipment that may fall into either category (or both), e.g., new

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Codified at 47 U.S.C. § 151 et seq.) ("1996 Act").

technical requirements and protocols, and new combinations of technical requirements and protocols, in various operating environments. In addition, it is difficult to specify with precision the optimal level or timing of the information disclosure mandated by Section 273 that would ensure competitive equipment markets.

For these reasons, the Commission should avoid adopting rigid, overly detailed rules in this docket to address the wide variety of industries and products that could potentially be affected by BOC entry into equipment manufacturing. Instead, the Commission should use this proceeding to establish disclosure requirements that will encourage compliance with Section 273 and principles by which the Commission can evaluate individual challenges to compliance in the marketplace. The Commission's rules should create incentives for the BOCs to err on the side of compliance with the new competitive landscape outlined by the 1996 Act, and should minimize any enforcement delays which otherwise reward the sluggish and reactive carrier. Accordingly, the Commission should also establish in this proceeding expeditious special procedures to resolve challenges to a BOC's disclosure effort and enforce the Commission's standards.

I. APPLICATION OF SECTION 273(c)(3) DISCLOSURE RULES TO BOC COLLABORATIONS WITH EQUIPMENT MANUFACTURERS, RESEARCH RELATED TO MANUFACTURING, AND ENTRY INTO ROYALTY AGREEMENTS

Section 273(b) authorizes the BOCs to engage in "close collaboration with any equipment manufacturer;" to engage in "research activities related to

manufacturing;” and to enter into royalty agreements with equipment manufacturers. The NPRM seeks comment regarding the interplay between this authorization and the disclosure requirements under Section 273(c).³

The disclosure requirements in Section 273 should be applied to information regarding protocols and technical requirements for connection with and use of telephone exchange service facilities provided by the BOC to any manufacturer with whom it collaborates or enters into a royalty agreement or through which it engages in manufacturing research. Section 273(c)(3) authorizes the Commission to apply the statutory disclosure requirements in such cases by expressly providing that the Commission may prescribe any additional rules necessary “to ensure” that equipment manufacturers “have access to the information . . . that a Bell operating company makes available to *any* manufacturing affiliate or *any unaffiliated* manufacturer.”⁴ While Section 273(b) clarifies that BOCs are allowed to collaborate, engage in research related to manufacturing, and enter into royalty agreements before they are granted Section 271 authority to provide interLATA services, nothing in the Act suggests that disclosure requirements different from those provided under Section 273(c) would apply in such cases. If the Commission does not so construe these provisions, the BOCs could circumvent the pro-competitive intent of Section 273

³ NPRM at ¶ 12.

⁴ Act at 273(c)(3) (emphasis added).

by selectively disclosing information to some, but not all, manufacturers, thus competitively disadvantaging some manufacturers.

Any rules established pursuant to Section 273(c)(3) also can and should protect proprietary information provided to a BOC *from* a manufacturer who is not subject to the 1996 Act's requirements and who has entered into a collaborative or royalty arrangement. Protection of such proprietary information is necessary to preserve both competition in equipment markets and the competitive benefits of BOC entry into those markets

In order to achieve a balance between the disclosure required by the Act and the protection of non-BOC proprietary information required to preserve competition, the Commission's rules must distinguish carefully between information regarding a BOC's *network* and the information regarding a collaborator's (or BOC manufacturing affiliate's) *equipment*. Information that is provided by a BOC to a partner about the BOC's *network* and its capabilities for interacting with equipment, should be presumptively classified as disclosable, regardless of whether the information has been shared only with a collaborator, royalty agreement partner, or entity with or through whom the BOC is engaging in research relating to manufacturing.

Simultaneously, a BOC should be required to protect proprietary information obtained from unaffiliated collaborators, royalty agreement partners, or entities with or through whom the BOC is engaging in research relating to manufacturing and to exclude such proprietary information when the BOC files its Section 273 data with the Commission. Thus, information regarding

equipment or equipment manufacturing provided by a non-BOC collaborator to a BOC during a collaborative design and development process, through a royalty agreement, or as part of a research activity, should be presumed outside the category of information a BOC must disclose (*i.e.*, “protocols and technical requirements for connection with and use of telephone exchange service facilities”). Any party seeking such information must bear the burden of demonstrating that the information falls within the BOCs’ statutory requirements.

II. BOC DISCLOSURE REQUIREMENTS

The NPRM notes that information regarding the technical characteristics of a BOC’s network is essential for competitive manufacturing of TE and CPE. Similarly, changes in technical specifications, protocols, or both may foreclose or inhibit competition if a manufacturer affiliated with the BOC receives advance notice of such changes and is therefore able to introduce modified or new compatible products ahead of its competitors.⁵ To avoid this result, Section 273(c) requires the Commission to establish rules requiring BOCs to “maintain and file with the Commission full and complete information with respect to the protocols and technical requirements for connection with the use of its telephone exchange service facilities,” and to “report promptly . . . any material changes or planned changes to such protocols and requirements, and the schedule for

⁵ NPRM at ¶ 13.

implementation of such changes or planned changes.”⁶ The NPRM seeks comment on the content, timing, and form of such disclosure.

A. Information Disclosed By A BOC Should Be As Complete As Possible To Allow Equipment Manufacturers to Develop Competitive Products Compatible With a BOC’s Network

Consumer equipment markets (for both traditional telephony and IT products) are changing at a fast and furious pace. The Commission’s disclosure requirements must be flexible enough to address unpredictable and often disparate industry needs and product cycles while protecting the diverse interests of equipment market participants and advancing competition and innovation in those markets.

The Commission’s rules should require the BOCs to disclose all technical data and protocols necessary for manufacturers to design and build a competitive product for use with the BOCs’ telecommunications networks within the time frame established for introduction of a BOC manufacturing entity’s or affiliate’s competing product.

The Commission proposes to require that this disclosure be “at the highest level of disaggregation feasible.”⁷ ITI supports this standard. The standard both comports with the 1996 Act’s mandate that BOCs disclose “full and complete” information, and recognizes that the costs of failing to disclose adequate information far exceed the costs of disclosing too much.

⁶ 47 U.S.C. 273(c)(1)

⁷ NPRM at ¶ 24.

Incomplete information, as the NPRM notes, “may make interconnection with other carriers difficult, limit inter-network performance, or fail to meet the level of ‘full and complete’ disclosure mandated by Section 273(c)(1).”⁸ Manufacturers who do not have sufficient information to build and sell a competitive product, will be frozen out of the consumer equipment market. Any rule or regulation that permits such an anti-competitive result effectively sabotages the intent of Section 273. The Commission, therefore, should not require anything less than disclosure which is as complete as possible.⁹

The Commission expresses concern that requiring BOCs to disclose “otherwise proprietary or confidential information . . . could inhibit innovation or competition.”¹⁰ No such disclosure should be necessary under the Commission's proposed standard, however. Manufacturers need only the information regarding protocols and technical requirements regarding interconnection and/or use of the BOCs' networks that is necessary for the manufacturer to produce a

⁸ NPRM at ¶ 24.

⁹ The Commission should clarify that the statutory reference to “information with respect to . . . protocols and technical requirements” includes access to all software integral to telecommunications equipment. Because network features and functions are increasingly created through the use of software rather than hardware, the “protocols and technical requirements” relevant for connection with and use of telephone exchange service facilities will increasingly consist of software information.

The Commission also should clarify that the development of software that is integral to telecommunications equipment can only be accomplished by a BOC through its manufacturing affiliate. Section 272(a) of the 1996 Act requires that all manufacturing activities, as defined in Section 273(h), be provided through a separate affiliate. Under Section 273(h), manufacturing activities include the development of software integral to equipment hardware (as defined by the AT&T Consent Decree). Thus, the Commission should clarify that the 1996 Act requires the BOCs to develop such software only through affiliates that comply with the provisions of Section 272.

¹⁰ NPRM at ¶ 24.

competitive product compatible with the BOCs' networks. This information does not include proprietary information regarding innovative or competitive equipment that the BOCs may be developing.

In order to ensure the disclosure of adequate information for equipment manufacturers to compete on a level playing field, manufacturers should have an opportunity to seek additional information where they believe a BOC's initial disclosure is incomplete or otherwise inadequate. Manufacturers also should have a reasonable opportunity to obtain enforcement of the disclosure rules where they have reason to believe that a BOC has impermissibly withheld information. These procedural checks on BOC compliance are discussed below in conjunction with disclosure timing issues.

Finally, the Commission's disclosure standard also should require the BOCs to disclose the date on which they anticipate implementing any material or planned changes to their protocols and requirements that will in turn require manufacturers to modify or create new equipment. This proposal comports with the plain language of Section 273(c)(1), which requires a BOC to disclose its implementation schedule. Moreover, a manufacturer will need this information to determine whether the disclosed technical requirements and protocol are sufficient to design and complete a competitive product within the given time frame.

B. BOCs Can Have Flexibility Under The Rules To Determine The Timing of Disclosure If And Only If The BOCs Are Required To Err On The Side Of Early Disclosure And To Provide Manufacturers With An Opportunity To Seek Additional Information

As discussed above, the consumer equipment market is subject to considerable technological upheaval. Specifying a single disclosure time frame for all types of equipment would be impracticable and ineffectual. The Commission must allow room for the unpredictable and varying design and product cycles of different product types. Rather than specify a single point in time by which the BOCs would be required to disclose technical information and protocols for all possible uses of telephone exchange service facilities or interconnection therewith, the Commission should grant the BOCs limited flexibility to determine, on a case by case basis, the amount of lead time required to satisfy two conditions: (1) their disclosure must occur at the earliest possible time; and (2) their disclosure must occur in time to give competing manufacturers an adequate opportunity to produce equipment compatible with the BOC's new network services or changes.

The NPRM seeks comment on whether the "make/buy" point is an adequate trigger for timely disclosure because the BOCs' plans at that time would be "sufficiently developed to provide adequate and useful guidance to competing service providers," or whether such information would arrive too late for a rival manufacturer to introduce a competing product into the market.¹¹ Because of the variety of traditional telephony and IT equipment that now falls,

¹¹ NPRM at ¶ 22.

or soon could fall, within the statutory definitions of TE and CPE, the Commission should avoid adopting a single specific point in time as the “safe harbor” for a disclosure trigger. Product design and fabrication cycles vary tremendously depending on the number and complexity of features and functions that are integrated into a single piece of equipment. Moreover, product cycles for traditional telephony equipment may differ radically from those for appliances. Thus, disclosure at one point in time may be adequate for some products and wholly inadequate for others. For some products, disclosure may be more appropriate upon commencement of field trials or beta testing, for example. Accordingly, ITI supports Commission rules that would grant the BOCs some flexibility to determine which disclosure trigger is appropriate under the circumstances.

To discourage abuse of this flexibility, the Commission should prescribe certain minimum parameters to guide the BOCs and a process for obtaining and supplementing information that would ensure at least minimum compliance.

- The Commission should establish a minimum period prior to introduction of a new service or implementation of a network change by which BOCs must disclose the information required by Section 273. BOCs who choose to use the minimum period would bear the burden of justifying their use of the minimum period in any enforcement proceeding.
- The Commission should adopt a disclosure policy that errs on the side of early disclosure and creates incentives for the BOCs to do the same.

The Commission expresses concern that premature disclosure may have a chilling effect on the market, particularly if the disclosed information is inaccurate as to either the affected technical specifications or the anticipated date of availability.¹² These risks, however, are far outweighed by the damaging impact on competition that would result from disclosure so late that it forecloses competitive entry.

- Within a specified period after receipt of the disclosure notice, affected manufacturers should have the opportunity to request from the BOCs any additional information reasonably necessary to implement the necessary equipment changes. The equipment market varies across types of products and technologies; when generally disclosing technical information, BOCs may fail to incorporate industry-specific, non-proprietary information required by some manufacturers. These manufacturers should have the opportunity to seek such information. The BOCs should be required to respond to the request within a specified period thereafter. The BOC's response time must be sufficient to satisfy the statutory standard for disclosure, *viz.*, it must leave sufficient time for the manufacturer to develop a competitive product by the date on which the BOC intends to implement the network change or new service. If necessary, the BOC would be required to postpone implementation if its response is delayed. If the BOC refuses to provide the information requested, it should present the manufacturer with a written explanation, identifying the reasons for its decision.

¹² NPRM at ¶ 19.

- The Commission should enforce the disclosure requirements by allowing a manufacturer who disputes either the timing of the disclosure, or the adequacy of the disclosure (after the parties have used all reasonable efforts to resolve the dispute internally), to file a complaint with the Commission that would receive expedited treatment. The BOC should bear the burden of proving that the timing and/or content of the disclosure was justified under the circumstances since it at all times controls the flow of information.¹³ In addition, to reduce the BOCs incentive or ability to use enforcement delays to *de facto* deny additional information, a BOC's implementation of network changes or commercial introduction of equipment using the disputed information should be delayed pending resolution of the dispute. Where the Commission fails to resolve a dispute within sixty days, however, implementation of network changes or commercial introduction of equipment using the disputed information should be resumed.

The complaint process described above would both provide manufacturers with a fair opportunity to obtain needed information and create a strong incentive on the part of the BOCs to disclose such information. At the same time, neither the consumer nor the BOCs would be unduly penalized by delays due to a congested complaint process.

¹³ ITI supports the Commission's tentative conclusion that the BOCs also must provide timely disclosure of information on the implementation of telecommunications equipment to all local exchange service providers with whom they have interconnection agreements. NPRM at ¶ 29.

C. The Disclosed Information Should Be Maintained At An Internet Site Controlled By The Commission With Hypertext Links To BOC Internet Sites

Section 273 requires BOCs to both “maintain” Section 273 information and “file” the information with the Commission. The NPRM tentatively concludes that, in addition to filing Section 273 information with the Commission, each BOC should “maintain” the information required under Section 273(c) “within its service area in a form that is available for inspection by the public upon reasonable request.”¹⁴ The Commission reasons that information would then be available in a location physically nearer to those who will most need the information, and would encourage competition, by making the information more widely available than were it maintained by the Commission.¹⁵ In particular, the Commission proposes that the BOCs could discharge their obligation to “maintain” Section 273 information by placing the information on their “publicly-accessible World Wide Web sites” or through other Internet protocols.

ITI supports the Commission’s proposed use of Internet postings to “maintain” information, in addition to hard copy filings¹⁶ with the Commission. ITI also supports the Commission’s proposal to use hypertext links from its Internet site to BOC Internet sites. Both of these measures will ensure that the BOCs’

¹⁴ NPRM at ¶ 20.

¹⁵ *Id.*

¹⁶ The *filings* required by Section 273 should be in both paper and electronic format. Only hard copy print-outs with diskette copies permit the consistent formatting and invulnerability to electronic tampering required for the extensive tables, algorithmic data, and numeric information contained in these filings. The Commission should establish format and content standards like those adopted to implement the Section 251 network disclosure requirements.

Section 273 information is quickly and comprehensively made available to competing equipment manufacturers from a central point of contact. In addition, the Commission's proposal would ensure that changes or updates to the BOCs' information can be disseminated quickly and efficiently while minimizing the burden on the BOCs' competitors of retrieving the information required by the Act.

III. ALL BOCs SHOULD BE REQUIRED TO COMPLY WITH SECTION 273(e)

The NPRM requests comment regarding whether the requirements of 273(c) and 273(e) apply to all BOCs, or only those who engage in manufacturing. The Act's requirements apply to all BOCs, whether or not they engage in manufacturing. As the NPRM properly notes the plain language of Section 273(c) applies its provisions to all BOCs. Limiting the application of Section 273 to only those BOCs who are authorized to manufacture under Section 273(a) would permit as yet unauthorized BOCs with disclosable information to withhold that information, thus subverting the intent of Section 273.

IV. THE COMMISSION SHOULD STRICTLY CONSTRUCT THE SECTION 273 REQUIREMENTS FOR STANDARD-SETTING ENTITIES

Section 273(d)(4) imposes requirements on certain non-accredited standard-setting entities¹⁷ regarding the procedures and processes by which

¹⁷ The standard-setting entities subject to the "due process" requirements of Section 273(d)(4) are only those unaccredited standards development organizations that establish "industry-wide" standards or generic network requirements, or certify TE or CPE manufactured by unaffiliated entities. Section 273(d)(8) defines the term "industry wide" to mean only those "activities funded by or performed on behalf of local exchange carriers for use in providing wireline telephone exchange service whose combined total of deployed access lines in the United States

such entities develop standards. The NPRM notes that Congress included these requirements to “assure fair, even-handed certification processes, and prohibit[] anticompetitive behavior.”¹⁸ To achieve these objectives, the Commission should strictly construe the 1996 Act’s requirements.

Standard-setting bodies like those to whom Section 273(d)(4) applies have the practical ability to foreclose markets to equipment manufacturers by adopting standards that favor one manufacturer’s equipment over another. Therefore, a fair, unbiased standard-setting process is crucial to ensure vigorous competition in the equipment marketplace. Because the BOCs will now be permitted to enter the manufacturing market (once the requirements of Section 271 are satisfied), BOC participation in and dominance of the standard-setting process can threaten competition if the statutory requirements of a fair and open process are not followed closely. Given the profound impact on competition that a BOC-dominated standard-setting process can have in the equipment marketplace, the Commission must strictly construe the requirements of Section 273(d) to ensure that competition is protected from self-interested behavior by the BOCs in standard-setting activities.

CONCLUSION

ITI supports the Commission’s efforts to adopt Section 273 rules that preserve both the competitiveness and innovation that characterize today’s CPE

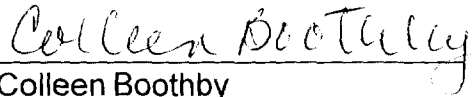
constitutes at least 30 percent of all access lines deployed by telecommunications carriers” in the U.S. as of the enactment of the 1996 Act.

¹⁸ NPRM at ¶ 49.

and IT equipment markets. To do so, the Commission must adopt regulations that grant the BOCs some flexibility to accommodate differences in the design and production schedules for a wide variety of manufacturing activities, while simultaneously constraining anti-competitive behavior that would compromise the objectives of Section 273. By adopting regulations that establish the proper mix of flexibility and regulatory constraints, the Commission will ensure that today's competitive, robustly innovative markets for information technology appliances and traditional telephony equipment will be enhanced, rather than impaired, by BOC entry.

Respectfully submitted,

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